Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. **79-1883**

WESTINGHOUSE ELECTRIC CORPORATION,
PETITIONER, et al.

vs.

JUDITH HUNTER, et al.
RESPONDENTS

PETITIONER WESTINGHOUSE ELECTRIC CORPORATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

WESTINGHOUSE ELECTRIC CORPORATION,
PETITIONER, et al.

vs.

JUDITH HUNTER, et al., RESPONDENTS

PETITIONER WESTINGHOUSE ELECTRIC CORPORATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Westinghouse Electric Corporation, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1-A) is unreported. The United States District Court for the Southern District of Ohio dismissed plaintiffs Hunter and Vance without opinion (App. A, *infra*, 3-A) and is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra* 1-B) was entered on February 28, 1980. The jurisdiction for this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS PROPERLY INTERPRETED THE 1972 AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 BY RETROACTIVELY APPLYING SAID AMENDMENTS TO REINSTATE CHARGES UNTIMELY FILED IN 1970.

2. WHETHER IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO RETROACTIVELY APPLY A LESISLATIVE ENACTMENT IN A MANNER THAT REINSTATES RIGHTS THAT HAD BEEN EXTINGUISHED, THAT RESULTS IN UNEQUAL TREATMENT OF PERSONS SIMILARLY SITUATED, AND THAT RESULTS IN AN ABRITRARY AND IRRATIONAL ADMINISTRATION OF SAID LEGISLATION.

STATUATORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory provisions at issue in this case under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.) are as follows:

1. 42 U.S.C. §2000e-5(d) (prior to 1972 amendments) which provides in part:

"Charges under sub-section (a) shall be filed within ninety (90) days after the alleged unlawful employment practice occurred . . .";

2. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §4, 86 Stat. 103 (amending 42 U.S.C. §2000e-5[d]), which provides in part:

"A charge under this section shall be filed within one hundred and eighty (180) days after the alleged unlawful employment practice occurred . . ."

3. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §14, 86 Stat. 103 (amending 42 U.S.C. §2000e-5[d]), which provides:

"The amendments made by this Act to (42 U.S.C. §2000e-5) shall be applicable with respect to charges pending with the Commission on the date of this Act and all charges filed thereafter."

The relevant constitutional provision at issue in this case is the Fifth Amendment, which provides in part:

". . . nor deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF FACTS

1. The three plaintiffs in this action (Marlene Campbell, Shirley Vance and Judith Hunter) were formerly employed by Westinghouse at its Byesville, Ohio plant. Each participated in an illegal work stoppage on September 10, 1969, and were terminated by Westinghouse on September 26, 1969, because Westinghouse determined after an investigation that they were the instigators of the illegal strike.

2. Plaintiff Campbell filed a charge alleging sex discrimination with the Equal Employment Opportunity Commission ("EEOC") on December 2, 1969. This charge was filed within ninety (90) days of the

alleged act of discrimination, and the timeliness of plaintiff Campbell's charge of discrimination is not in issue.

3. Plaintiffs Hunter and Vance filed charges alleging sex discrimination with the EEOC on February 27, 1970. These charges were filed one hundred fifty-four (154) days after the alleged act of discrimination, and were, therefore, untimely under 42 §2000e-5(d) as it read at that date.

4. The EEOC treated the charges of Hunter and Vance as timely filed, but did not notify petitioner Westinghouse Electric Corporation or its successor and co-defendant, Scoville Manufacturing Company, of said charges until August 8, 1974, nearly five years after the alleged act of discrimination.

5. On May 8, 1972, over two and one-half (2-1/2) years after the alleged discriminatory act but more than two (2) years before the employer was notified of the charge, petitioner Westinghouse Electric sold its Byesville plant to Scoville Manufacturing causing some plant records to be delivered to Scoville, others to be transported to different Westinghouse facilities, and important plant management personnel to be scattered throughout the country.

6. On May 10, 1976, the EEOC issued "right to sue" letters to plaintiffs Campbell, Hunter and Vance, and on June 24, 1976, suit was instituted in the United States District Court for the Southern District of Ohio, pursuant to the federal jurisdiction granted by 42 U.S.C. §2000e-5 and 29 U.S.C. 185.

7. On motion of the co-defendants based upon the failure of plaintiffs Hunter and Vance to file timely charges with the EEOC, the District Court dismissed,

without opinion, Hunter and Vance from the lawsuit. On appeal to the United States Court of Appeals for the Sixth Circuit, the dismissal of Hunter and Vance was reversed. The court of appeals found that the expansion of the time to one hundred eighty (180) days for filing charges of discrimination with the EEOC enacted as part of the 1972 amendments to 42 U.S.C. §2000e-5 was applicable to the untimely charges filed by Hunter and Vance.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. INTERPRETATION OF THE 1972 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1964

The decision of the United States Court of Appeals for the Sixth Circuit in this case on the retroactivity of the 1972 amendments to the Civil Rights Act of 1964 (hereinafter referred to as the "1972 amendments") together with the decision of the Ninth Circuit in *Inda v. United Airlines, Inc.*, 565 F.2d 554 (9th Cir. 1977), *cert. den.*, 435 U.S. 1007 (1978) and the Eighth Circuit in *Wood v. Southwestern Bell Telephone Co.*, 580 F.2d 339 (8th Cir. 1978), raise an important questional of federal law that was recognized by this Court in *International Union of Elec. Workers, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243 n.17 (1976), but was not therein addressed: Does the enlarged limitation period of the 1972 amendments redound to benefit persons who filed a charge more than 90, but less that 180, days from the date of the alleged "occurrence" where the 180 days had run

prior to March 24, 1972 (the effective date of the 1972 amendments)?

The time limitation for filing a charge with the EEOC is a jurisdictional prerequisite that an individual must satisfy before being entitled to bring a suit in the federal courts. "[Title VII] specifies with precision the jurisdictional prerequisite that an individual must satisfy before he is entitled to institute a lawsuit." One of the prerequisites is to "[file] timely a charge with the Commission." *Alexander v. Gardner-Dener Co.*, 415 U.S. 36, at 47, (1974). As this Court has stated:

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences. *United Air Lines v. Evans*, 431 U.S. 553, at 558 (1977).

From the language in *United Air Lines v. Evans, supra*, it is clear that the timely filing of a charge with the EEOC is a jurisdictional prerequisite to maintaining an action under Title VII and the failure to file a timely charge destroys a claimant's right to avail himself of the rights created by Title VII. The question then presented is whether the 1972 amendments can be retroactively applied to reinstate an otherwise untimely charge of discrimination that is "... the legal equivalent of a discriminatory act which occurred before the statute was passed." *United Air Lines v. Evans, supra,* at 558.

In *International Union of Electrical Workers v. Robbins & Myers, Inc., supra* (hereinafter referred to as *"Electrical Workers"*), this Court had the opportunity to consider the retroactivity of the 1972 amendments. *Electrical Workers* involved a charge that was filed more than 90 days after the alleged discriminatory act, but within 180 days of March 24, 1972, the effective date of the 1972 amendments. This Court reviewed the applicable statute and observed:

> Robbins & Myers also contends that the amendment is not applicable to the charge filed by Guy with the EEOC, since, being untimely when filed, her charge could not have been "pending with the Commission on the date of enactment of this Act." This reading of "pending" — confining to charges still before the Commission and timely when filed — is not the only possible meaning of the word, is largely rebutted by the legislative history, and renders the language of §14 virtually meaningless insofar as the enlarged limitations period is concerned. Since Congress also applied the enlarged limitations period to charges, whether or not untimely on March 24, "filed thereafter," *we should not presume Congress created this odd hiatus in retroactivity suggested by Robbins & Myers unless congressional intent to do so was conveyed by language more precise than "pending,"* cf. *Love v. Pullman Co.*, 404 U.S. 522, 30 L. Ed. 2d 679, 92 S. Ct. 616 (1972). "Pending" is simply not a term of art that unambiguously carries with it a meaning precisely suited for this situation; equally logical, for example would be an interpretation that read "pending" to mean "filed and not yet rejected," cf. *Committee Legis. Hist., supra,* n.16, at 1851. We hold that Congress intended the 180-day

> period to be applicable to charges such as that filed by Guy, where the charge was filed with the EEOC prior to March 24, 1972, and alleged a discriminatory occurrence within 180 days of the enactment of the Act. 429 U.S., at 242. (emphasis added) (footnotes omitted).

In footnote 17, however, this Court expressly declined to rule on whether the enlarged time limitations would apply to discriminatory acts which occurred more than 180 days prior to March 24, 1972.

The logic of *Electrical Workers* in treating, as timely, charges filed concerning acts occurring within 180 days of the new amendments is readily apparent. To illustrate, it would make no sense to distinguish between two claims based on discriminatory acts occurring 179 days before March 24, 1972 simply because one claimant filed an untimely charge with EEOC 91 days after the occurence, while the other claimant initially filed his charge on March 25, 1972. Clearly the latter would have a valid claim because March 25, 1972 is within 180 days of the alleged discrimination. But in the absence of the retroactive application applied in *Electrical Workers* the first claimant would be arbitrarily penalized for filing before the act rather than after the act. This is the "*odd hiatus*" referred to in *Electrical Workers*. The same rationale, however, would not be applicable to discriminatory acts occurring more than 180 days prior to March 24, 1972, for in that case no one would have a right to file for the first time on March 25, 1972. It is apparent that this Court was cognizant of this distinction because otherwise there would have been no need to limit the holding in *Electrical Workers* to claims

arising within 180 days of March 24, 1972.

The Ninth Circuit in *Inda v. United Air Lines, Inc.*, *supra*, was the first court of appeals, after the *Electrical Workers* decision, to consider the retroactivity of the 1972 amendments to untimely charges filed more than 180 days prior to March 24, 1972. After reviewing this Court's opinion in *Electrical Workers*, the Ninth Circuit concluded:

> "If the charge was, on the date of enactment, on file with the Commission, and if final action had not yet been taken by the Commission with respect to the charge, the charge was pending in the sense in which that term is commonly used. It is that sense that we have attributed to Congress." 565 F.2d 554, at 561.

The Tenth Circuit followed *Inda* in *Wood v. Southwestern Bell Telephone Co.*, *supra*, wherein the Court stated:

> "The basis for the Court's decision in *Electrical Workers* was that "pending cases" logically means cases on which the EEOC has yet to take final action. In our opinion this reasoning extends to all cases pending, and not simply those in which the discriminatory act occurred within 180 days of the amendment. This one factual difference does not provide any reasonable basis on which a different result in this case could be distinguished.

In the instant case the Sixth Circuit based its decision on *Inda* and *Wood* (App. A, *infra*, 1-A).

Thus, three courts of appeals have considered this issue after *Electrical Workers* and have determined that there is not a distinction between cases that were untimely more than 180 days prior to March 24, 1972, and cases that were filed within

180 days of March 24, 1972. The petitioner respectfully submits that the circuit courts, in so holding, have improperly interpreted this Court's decision in *Electrical Workers* by not taking into consideration that the "*odd hiatus*" presented by charges filed within 180 days of the 1972 amendment is not present in charges filed more than 180 days prior to March 24, 1972, and by failing to recognize that this Court in *Electrical Workers* specifically limited its holding to charges filed within 180 days of March 24, 1975.

> "We hold that Congress intended the 180 day period to be applicable to charges such as that filed by Guy, where the charge was filed with the EEOC prior to March 24, 1972, and alleged a discriminatory occurrence within 180 days of the enactment of this Act." 429 U.S., at 243.

2. A RETROACTIVE APPLICATION OF LEGISLATIVE ENACTMENT THAT OPERATES IN AN UNEQUAL AND ARBITRARY MANNER IS UNCONSTITUTIONAL

Under the *Electrical Workers* decision the expanded time limit of the 1972 amendments inures to the benefit of all persons who filed a charge based upon an alleged discriminatory act occurring within 180 days of March 24, 1972. This holding is consistent with the clear language and legislative intent of the 1972 amendments because any such person so situated would have had the right to file a timely charge on March 24, 1972. Retroactive application of the 1972 amendments in this circumstance is merely an expansion of the existing remedy

that was available to all persons similarly situated alleging a discriminatory act occurring within 180 days of the effective date of the 1972 amendments. This type of retroactive application of legislation is clearly constitutional, and this Court so found in *Electrical Workers*. Indeed, it is not really a retroactive application. Under *Electrical Workers*, the statute is given immediate prospective effect in that on March 24, 1972, and at anytime thereafter, an individual may file a discrimination charge alleging a wrongful act occurring within the preceeding 180 days.

If, as the circuit courts have found, such principal should be expanded retroactively to include claims which could not be timely brought by filing anew on March 24, 1972, then the retroactivity of the 1972 amendments (i) operates in an essentially, *ex post facto* fashion by creating a right in an untimely charge from an alleged discriminatory act that is ". . . the legal equivalent of a discriminatory act which occurred before the statute was passed," *United Air Lines v. Evans, supra*, at 553; (ii) provides for unequal treatment of employers and employees who are similarly situated; and (iii) creates an arbitrary and capricious application of statutory rights created under Title VII. All three of these results are violative of the fundamental fairness embodied in the due process clause of the Fifth Amendment.

The prohibition against "ex post facto laws" contained in Article I §8, cl. 18 of the Constitution of the United States has been held to apply only to prosecutions of crime, *Galvin v. Press*, 347 U.S. 522 (1954), but in the civil context it has been recognized by this

Court that while retrospective legislation may be constitutionally permissible, such legislation must meet the test of due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In *United Air Lines v. Evans, supra*, this Court characterized an untimely filed charge under Title VII to be: ". . . the legal equivalent of a discriminatory act which occurred before the statute was passed . . . it is merely an unfortunate event in history which has no present legal consequences." 431 U.S., at 558. If as *Evans* suggests, a party filing a late claim stands in the same position as a party who suffered discrimination before Title VII was enacted, then the retroactive application of the 1972 amendments by the circuit courts creates a liability for employers such as Westinghouse that controvenes the basic notions of fairness embodied in the due process clause of the Fifth Amendment by retrospectively creating a liability years later that had never previously existed. Thus, unlike the situation in *Campbell v. Holt*, 115 U.S. 620 (1885) and *Chase Securities Corporation v. Donaldson*, 325 U.S. 304 (1945), it is not merely the remedy that is affected; it is the original cause of action that is a nullity. To give retrospective effect to the legislative enactment in the latter instance is a deprivation of Westinghouse's property without due process in controvention of the Fifth Amendment. *Danzer v. Gulf & Ship Island Railroad Co.*, 268 U.S. 633 (1925). As this Court has stated:

> "In the William Danzer & Co. Case it was held that where a statute in creating a liability also put a period to its existence, a retroactive ex-

tension of the period after its expiration amounted to a taking of property without due process of Law." *Chase Securities Corporation v. Donaldson, supra,* at 311 n. 8.

The second constitutional flaw in the decisions of the circuit courts in retroactively applying the 1972 amendments to untimely charges arising from alleged discriminatory acts taking place more than 180 days prior to March 24, 1972, is the disparate treatment that results for persons similarly situated. Unlike the situation covered in *Electrical Workers* of persons who filed charges based upon alleged discriminatory acts occurring within 180 days of March 24, 1972, where all are treated equally, the retroactive application of the 1972 amendments to charges stemming from discriminatory acts occurring more than 180 days prior to March 24, 1972, results in an irrational classification of persons similarly situated. On one hand there is the class of employees whose rights have been foreclosed and employers whose potential liability has been extinguished because the EEOC *properly* handled and dismissed the charge as untimely. On the other hand, there is the class of employees who are blessed with the retroactive application of the 1972 amendments and employers who have for the first time been placed in jeopardy because the EEOC either *improperly* handled the charge, or failed to act at all.[1] Such a classification based upon the fortuity of administrative incompetence or overload lacks a "reasonable basis,"

[1]Petitioner asserts that proper administrative handling of a charge alleging a discriminatory act occurring in 1969 and filed more than 90 days thereafter would have been to promptly dismiss the charge, or at least to have dismissed the charge in less than 2-1/2 years.

Dandridge v. Williams, 397, U.S. 471, at 501 (1970). To avoid the unconstitutional classification, all past charges filed within 180 days of the alleged act of discrimination would have to be treated as timely, whether or not the EEOC had previously dismissed them. But, there is no room in the statutory language for such an interpretation. No reasonable basis being shown for the classification adopted by the Court of Appeals herein, that classification is without constitutional footing.

Finally, the 1972 amendments as interpreted by the courts of appeals, are arbitrary and irrational in application in that employers are only subjected to potential liability if the EEOC improperly failed to dismiss an untimely charge. And, ironically, the more egregious the delay on the part of the EEOC in failing to dismiss the untimely charge, the greater the potential liability for the employer. This arbitrary and irrational retroactive application of the law constitutes a violation of employers' due process rights. *Usery v. Turner Elkhorn Mining Co., supra.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Westinghouse Electric Corporation

APPENDIX "A"

No. 77-3473

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDITH HUNTER and SHIRLEY VANCE,
Plaintiffs-Appellants,

v.

WESTINGHOUSE ELECTRIC CORPORATION; HAMILTON BEACH DIVISION, SCOVILL MANUFACTURING COMPANY and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local 2196,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed February 28, 1980.

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

PER CURIAM. This appeal raises the same issue decided by the Ninth Circuit in *Inda* v. *United Airlines, Inc.*, 565 F.2d 554, 560 (1977) and by the Eighth Circuit in *Wood* v. *Southwestern Bell Telephone Co.*, 580 F.2d 339 (1978), namely: whether the statutory amendment allowing 180 days rather than 90 days for filing Title VII sex discrimination charges with the Equal Employment Opportunity Commission applies to sex discrimination charges still pending before the Commission but filed more than 180 days prior to the effective date of the amendment. When Congress amended Title VII in 1972 to extend the 90-day period to 180 days, 86 Stat. 103,

42 U.S.C. § 2000e-5(e) (1976), it provided in § 14 that the amendments "shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." 86 Stat. 113.

On February 27, 1970, about 154 days after discharge, plaintiffs Vance and Hunter filed sex discrimination charges with the Commission. The Commission accepted the charges and treated them as timely. It issued determinations on January 6 and 7, 1976, that there was reasonable cause to believe that the claims of all three women were true. Conciliation efforts failed, and the Commission issued to plaintiffs a notice of their right to sue.

Suit was timely filed. The defendants, Westinghouse Electric Corp., and its successor in interest, Scovill Manufacturing Company, moved to dismiss the claims for failure to file timely EEOC charges. They contended that the charges had not been filed within 90 days of the discharges and were, therefore, beyond the 90-day limitation period specified for charges at the time of filing. The District Court granted the motion without stating a reason.

For the reasons fully set out in the opinions of the Ninth and Eighth Circuits in *Inda* and *Wood*, *supra*, we join those Circuits in holding that the word "pending" in the above-quoted statutory amendments includes charges filed with the Commission more than 180 days prior to the enactment of the amendments, so long as the Commission, as here, had not yet formally acted upon the charges.

Accordingly, the judgment of the District Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
JUN 2 3 2...
EAST. DIV. COLUMBUS

Judith Hunter, et al., :

Plaintiffs :

-v- :

Case No. C-2-76-469

Westinghouse Electric Corporation, et al., :

Defendants :

O R D E R

Upon consideration, the motions to dismiss are GRANTED as to plaintiffs Judith Hunter and Shirley Vance, and DENIED as to plaintiff Marlene Murray.

So ORDERED.

Robert M. Duncan, Judge
United States District Court

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

FEB 29 1980

JOHN P. HEHMAN, Clerk

No. 77-3473

JUDITH HUNTER and
SHIRLEY VANCE,

Plaintiffs-Appellants,

v

WESTINGHOUSE ELECTRIC CORPORATION;
HAMILTON BEACH DIVISION, SCOVILL
MANUFACTURING COMPANY and THE
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, Local 2196,

Defendants-Appellees.

Before: WEICK, LIVELY and MERRITT, Circuit Judges.

J U D G M E N T

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

Issued as Mandate: March 28, 1980

A True Copy.

COSTS: (To be recovered by appellants)

Attest:

Filing fee.....	$ 50.00
Printing	$-----
Total	$ 50.00

Deputy Clerk